Supreme Court, U. S.
FILED
OCT 18 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-407

JULIO DIAZ,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the New York Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013
(212) 732-7300

PETER L. ZIMROTH
BRIAN ROSNER
Assistant District Attorneys
Of Counsel

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
The Proceedings in the Courts Below	2
The Suppression Hearing and Trial	2
The Appeal	4
Point—Review on certiorari is unwarranted since the decision below did not resolve a novel question of federal law and was, in any event, correct	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Adams v. Williams, 407 U.S. 143 (1972)	5, 6, 7
People v. Tutt, 38 N.Y.2d 1011 (1976)	6
Street v. New York, 394 U.S. 576 (1964)	6
Stembridge v. Georgia, 343 U.S. 541 (1952)	6
Terry v. Ohio, 392 U.S. 1 (1967)	5

Other Authorities:

Cohen and Karger, *Powers of the New York Court of Appeals,* Section 174 (1951)	5
New York Civil Practice Law and Rules, Section 5613	5
Penal Law Section 220.15, repealed L. 1973, c. 276, Section 18	1, 2
New York Criminal Procedure Law, Section 470.35	6

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-407

JULIO DIAZ,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the
New York Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

On March 20, 1974, Julio Diaz was convicted in the Supreme Court, New York County (FLYNN, J.), after a jury trial, of CRIMINAL POSSESSION OF A DANGEROUS DRUG IN THE FOURTH DEGREE (former Penal Law Section 220.15, repealed L. 1973, c. 276, Section 18). On June 7, 1974, petitioner was sentenced to an indeterminate term of imprisonment not to

exceed three years. In a November 6, 1975 order, the Appellate Division of the New York State Supreme Court reversed petitioner's conviction. In a February 17, 1977 order, the New York State Court of Appeals reinstated petitioner's conviction. In a June 16, 1977 order, the Appellate Division, on remittitur from the Court of Appeals, entered an order affirming petitioner's conviction. Diaz now seeks a writ of certiorari to review the February 17, 1977 order of the Court of Appeals.

The Proceedings in the Courts Below

On March 9, 1973, Julio Diaz and a cohort, Hector Batista, possessed twenty-six glassine envelopes containing, in total, five-sixteenths of an ounce and nine grains of heroin. In an indictment filed on April 13, 1973, Diaz was charged with criminal possession of a dangerous drug in the fourth degree (former New York Penal Law §220.15). New York County Indictment Number 1775A/73.

The Suppression Hearing and the Trial

Prior to trial, petitioner moved to suppress the heroin. At a hearing, the two arresting officers testified that they and two other policemen were on patrol on the evening of March 9, 1973. As their vehicle stopped for a light, they noticed a car with two males in the front seat (52, 79-80).* A neighborhood narcotic addict was talking to the person in the driver's seat of the car, and a local prostitute was standing on the sidewalk (25, 79-80).

* Numerals in parentheses refer to the pages of the People's appendix in the New York State Court of Appeals.

The narcotic addict removed money from his pocket, counted it out and handed it to the driver, the petitioner. The petitioner handed something back in a closed fist (26, 79, 96). The prostitute and the addict looked in the direction of the four policemen and walked hurriedly away (26, 80).

Then, for the purposes of investigation, two officers approached the car under observation (27). To insure their safety during the investigation, the officers told the petitioner to pull the car to the curb and to get out of the vehicle (81). As petitioner left the car, the officers saw petitioner attempt to conceal a bag containing glassine envelopes filled with a white powder which the officers believed to be heroin (28, 29, 33).

The petitioner presented no evidence at the suppression hearing.

During the argument of the suppression motion, defense counsel conceded that the police were justified in approaching petitioner's car for the purpose of investigation (112-113). After argument, the trial court (Rosenberg, J.) denied the motion. The court held that the police officers' testimony was credible. The court found that the police had observed contraband in plain view after they had approached the petitioner's vehicle to investigate (4a-7a). The court further held that making inquiries about narcotics justified the officers' minimal safety measure of ordering petitioner to leave the vehicle (7a-8a).

Following a jury trial, the petitioner was convicted of the charge set forth in the indictment. On June 7, 1974, he was sentenced to an indeterminate term of imprisonment not to exceed three years.

The Appeal

On the appeal to the Appellate Division of the New York State Supreme Court, petitioner asserted that the police had no justification for approaching his car and that, but for the unlawful approach, the heroin would not have been seen in plain view. In an order entered November 6, 1975, the Appellate Division suppressed the heroin found in petitioner's car and reversed his conviction. The Appellate Division held, as a matter of law, that the police had insufficient justification to approach petitioner's vehicle (16a).

In a February 17, 1977 order, the Court of Appeals reinstated the judgment of conviction. The Court of Appeals noted that defense counsel had not disagreed with the trial court's statement "that there was no disputed issue with respect to the police officers' right 'to go over to' the car to investigate the suspicious activity they had observed" (17a-18a). Therefore, under New York State law, petitioner had failed to preserve for appellate review legal questions concerning the officers' authority to approach petitioner's vehicle.

The only legal question preserved for review "was whether the police could also direct the [petitioner] to shut off the ignition and get out of the car which was then stopped at a traffic light" (18a). The hearing court had made the factual determination that the officers had told petitioner to leave the vehicle "in order to insure [the officers'] safety during the inquiry" (18a). Since the officers' order was based on a justifiable fear for their safety, the Court of Appeals held, as a matter of law, that the order to petitioner was a reasonable intrusion on petitioner's right to privacy (18a).

The case was remitted to the Appellate Division. The Appellate Division has the power to review facts. However, since it had reversed petitioner's conviction on the law, the Appellate Division had not reviewed the trial court's factual determinations. The Court of Appeals remitted the case so that the Appellate Division could have the opportunity to review the facts. *See* New York Civil Practice Law and Rules, Section 5613; Cohen and Karger, *Powers of the New York Court of Appeals,* Section 174 (1951).

In an order entered on June 16, 1977, the Appellate Division affirmed petitioner's conviction (23a).

POINT

Review on certiorari is unwarranted since the decision below did not resolve a novel question of federal law and was, in any event, correct.

In evaluating the constitutionality of the police behavior in this case, the court below relied on a familiar principle of search and seizure law. An officer who is conducting an authorized investigation may take whatever action is reasonably necessary to assure his safety. *Adams* v. *Williams,* 407 U.S. 143, 147 (1972); *Terry* v. *Ohio,* 392 U.S. 1, 19-20 (1967).

As noted by the New York Court of Appeals, defense counsel did not disagree with the hearing court's comment that there was no disputed issue regarding the officers' right "to go over to" petitioner's car to investigate (17a-18a). Since, at the hearing, the petitioner did not dispute the officers' authority to approach his car, there is a substantial question whether this Court has jurisdiction to

consider federal questions regarding that approach. Because of petitioner's failure to contest the approach at the hearing stage, the Court of Appeals was precluded from reviewing the issue. *See People* v. *Tutt,* 38 N.Y.2d 1011 (1976); New York Criminal Procedure Law, Section 470.35. In fact, the Court of Appeals did not review questions regarding the officers' approach (18a). Therefore, that portion of the Court of Appeals' decision concerning the officers' approach is based on an independent and adequate non-federal ground, the New York rule requiring the "proper presentation" of legal issues. *Street* v. *New York,* 394 U.S. 576, 581-82 (1964); *see also Stembridge* v. *Georgia,* 343 U.S. 541, 547 (1952).

In any event, the police had great justification to approach petitioner's vehicle. The police had observed an unequivocal exchange involving a known narcotic addict. The police saw the addict count out money. They saw petitioner surreptitiously hand something to the addict in exchange for the money. Upon realizing that the exchange had been observed, the addict fled. Under these circumstances, only a dull and unimaginative policeman could have failed to conclude that an illicit sale of narcotics had occurred. As this Court has held, the police would have been derelict in their duty had they not approached petitioner to investigate. *See Adams* v. *Williams,* 407 U.S. at 145-46, *supra.*

The only issue left for this Court is the correctness of the Court of Appeals' determination that the police order that petitioner shut off the ignition and get out of his car was constitutional because it was reasonably necessary to assure the officers' safety.

There is no reason for this Court to review this issue. It does not involve a novel question of federal constitutional law. Rather, the Court of Appeals was applying the familiar constitutional rule that an officer conducting an investigation may take action reasonably necessary to assure his safety. The purpose of certiorari would not be served by determining whether the Court of Appeals correctly applied a familiar rule in the context of this particular case.

In any event, the case was decided correctly. The police had great justification for investigating the observed transaction. The necessity of investigating required that they question petitioner. Under these circumstances, the officers' order that petitioner leave the car was a minimal intrusion designed to prevent an assault by a potentially hostile suspect. It is axiomatic that it is dangerous for policemen to approach vehicles in order to inquire about suspected criminal activities. *See Adams* v. *Williams,* 407 U.S. at 148, n. 3, *supra.* This danger is magnified when the officers' observations are indicative of an offense as grave as narcotics trafficking. Indeed, the officers testified that they feared for their safety when they approached petitioner's vehicle.

Despite this well-founded fear, the officers did not draw their weapons or attempt to frisk petitioner. The only action which the officers took to insure their safety was to ask petitioner to leave his vehicle, a request far less intrusive than a frisk or an approach with guns drawn. This request was necessitated by the ease with which a suspect in a car could reach for a weapon. The Fourth Amendment does not require policemen to refrain from taking measures to protect their lives when, as in this case, they have cause

to investigate activities fraught with danger to the inquiring patrolman. The officers' order to petitioner was reasonable, and there is no issue for this Court to review.

Conclusion

The petition should be denied.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County

PETER L. ZIMROTH
BRIAN ROSNER
Assistant District Attorneys
Of Counsel

October, 1977